APPEAL NO. 042349
FILED NOVEMBER 3, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 26, 2004. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 20%. The appellant (carrier) appealed, arguing that the hearing officer's IR determination is against the great weight and preponderance of the evidence, and asserts that the designated doctor's initial assessment that the claimant's IR is 10% be adopted. The claimant responded, urging affirmance.

DECISION

Affirmed.

We first address the carrier's assertion that this decision is on remand, and "reasserts its previously filed points" regarding injury, disability, intoxication, and waiver. Review of the record reflects that this decision was not remanded to the hearing officer, and these issues were not litigated at the CCH. We will not be addressing these issues in this decision.

It is undisputed that the claimant sustained a compensable injury to his low back on _____. The parties stipulated that the claimant reached maximum medical improvement (MMI) on July 31, 2003; that the claimant underwent a two-level fusion at L4-5 and L5-S1 on August 26, 2002, and a revision of that fusion on November 17, 2003; and that the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) applies to this case.

Section 408.125(c) provides that for a claim for workers' compensation benefits based on a compensable injury that occurs on or after June 17, 2001, the report of the designated doctor shall have presumptive weight, and the Texas Workers' Compensation Commission (Commission) shall base the IR on that report unless the great weight of other medical evidence is to the contrary, and that if the great weight of medical evidence contradicts the IR contained in a report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to the Commission's request for clarification is considered to have presumptive weight as it is part of the doctor's opinion.

The Commission-appointed designated doctor, Dr. N, examined the claimant on October 20, 2003, and he certified that the claimant reached MMI on July 31, 2003, with a 10% IR. In a letter of clarification dated December 30, 2003, Dr. N amended his report to reflect that the claimant had a 20% IR. Dr. N referenced Commission Advisory

2003-10, signed July 22, 2003, and determined that the claimant qualified for a 20% lumbar impairment under Diagnosis-Related Estimate (DRE) Lumbosacral Category IV, Loss of Motion Segment Integrity, because he "had a fusion from L4-S1."

The carrier contends that Dr. N misapplied the AMA Guides by amending his report and assessing a 20% IR based on Advisory 2003-10 and that this determination is contrary to the AMA Guides. The carrier specifically asserts that Advisory 2003-10 is invalid as a matter of law and constitutes improper *ad hoc* rulemaking. The Appeals Panels has held that whether the Commission exceeded its authority in issuing Advisory 2003-10 is a matter for the courts and will not be addressed here. *See* Texas Workers' Compensation Commission Appeal No. 040400, decided April 15, 2004.

The hearing officer did not err in giving presumptive weight to the designated doctor's amended report. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In this case, we are satisfied that the hearing officer's IR determination is sufficiently supported by the evidence.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge